Supreme Court, U.S.
FILED
APR 12 1995
OFFICE OF THE CLERK

No. 94-788

In The

Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

Petitioner,

vs.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

GRANT F. LANGLEY*
City Attorney
RUDOLPH M. KONRAD
Deputy City Attorney
200 East Wells Street
Room 800
Milwaukee, WI 53202
Telephone: (414) 286-2601

Of Counsel:

DAVID A. STRAUSS
1111 East 60th Street
Chicago, IL 60637
MICHAEL F. STURLEY
727 East 26th Street
Austin, TX 78705

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Alkmeon Naviera, S.A. v. M/V Marina L, 633 F.2d 789 (9th Cir. 1980) 4, 5

Blau v. Lehman, 368 U.S. 403 (1962) 6

Board of Commissioners of Jackson County v. United States, 308 U.S. 343 (1939) 6

Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989) 6

Rodgers v. United States, 332 U.S. 371 (1947) 6

The Maggie J. Smith, 123 U.S. 349 (1887) 4

The Manitoba, 128 U.S. 97 (1887) 4

The Scotland, 118 U.S. 507 (1886) 4

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 2, 3

United States Code

28 U.S.C. 1961(b)(1) 1

Other Authorities

S. Rep. No. 97-275, 97th Cong., 1st Sess. 11 (1981) 1

S. 1700, § 302, 97th Cong., 1st Sess. (1981) 1

ARGUMENT

1. Respondents' central contention appears to be that prejudgment interest must be awarded or plaintiffs will not be fully compensated. E.g., Resp. Br. 1-2, 9-12. But if this were the only principle governing awards of prejudgment interest, the Court's repeated references to the discretionary character of prejudgment interest would be inexplicable. We detail those references in our opening brief. Pet. Br. 8-14. We also show that Congress made a decision to leave this discretionary regime intact. Id. at 15-16.[1] Prejudgment interest has never been viewed – by the common law, in admiralty, by this Court in construing federal statutes, or by Congress – as simply a matter of

---

[1] Not only did Congress determine not to upset this discretionary regime, but even the proposed legislative reform, which was premised on the compensation of plaintiffs (see S. Rep. No. 97-275, 97th Cong., 1st Sess. 11 (1981)), was nonetheless fully consistent with what the district court did in this case. See S. 1700, § 302, 97th Cong., 1st Sess. (1981) at 68, adding 28 U.S.C. 1961 (b)(1):

> [T]he court may add [prejudgment interest] . . . where the facts of the controversy and the manner in which the case was litigated indicate that an award of such prejudgment interest is appropriate. . . . [I]nterest shall be . . . measured from the time that the party against whom damages have been awarded became aware of his potential liability or from the time that he should have become aware but, in any case, not to exceed a period of five years.

As we noted in our opening brief (at 16), the accompanying committee report stated that awards of prejudgment interest "would be left to the discretion of the district judge in each case." S. Rep. No. 97-275 at 12.

mechanically ensuring that plaintiffs receive the judgment in present-day dollars.

The discretionary nature of prejudgment interest cannot be understood unless one recognizes that an award of prejudgment interest imposes a burden on the defendant for its decision to continue contesting the litigation. See Pet. Br. 19-26. That is why mutual fault can justify withholding prejudgment interest: when the plaintiff is at fault, the trial court may be justified in concluding that the defendant acted reasonably in contesting the litigation, and therefore should not be burdened with an award of prejudgment interest. See id. at 22-24.

Respondents never address this justification for withholding prejudgment interest, which is a central argument in our opening brief. Instead, respondents, like the court of appeals, appear to believe that the only possible justification for denying prejudgment interest in a case of mutual fault was the desire to mitigate the harshness of the now-defunct divided damages rule. See Resp. Br. 16-22. This simply ignores the other justifications we advanced. In any event, as we explain in our opening brief, it is not plausible to suppose that subverting the divided damages rule was ever the principal justification for this approach to prejudgment interest. See Pet. Br. 27-32.

2. In this connection, respondents now appear to concede that the court of appeals was, as we maintained in our opening brief, in error on a central aspect of its reasoning. We showed in our opening brief that – directly contrary to the court of appeals – the overturning of the divided damages rule, in *United States v. Reliable Transfer*

Co., 421 U.S. 397 (1975), *increased* the uncertainty that the parties to an admiralty collision case faced and thereby made it *more* important for trial courts to have discretion to withhold prejudgment interest in mutual fault cases. Pet. Br. 31-32.[2] Respondents now admit this point. Resp. Br. 17-18 ("[B]efore *Reliable Transfer* . . . there may have been greater certainty . . . as to the result, that is, the exact measure of the amounts which the parties would owe").

Respondents seek to salvage their position by asserting that *Reliable Transfer* increased the "certainty" that the outcome of a collision case would be correct, in the sense of apportioning damages according to the parties' fault. See Resp. Br. 18 ("Since *Reliable Transfer* . . . there is absolute certainty, based upon a comparative, pro rata percentage, as to the correctness of the result."). But this point goes only to the soundness of the decision in *Reliable Transfer*, which of course we have never questioned. It has nothing to do with the uncertainty the parties face in predicting their liability and entering into rational settlements. That uncertainty, which respondents now agree was only increased by *Reliable Transfer*, is the issue that bears on the appropriateness of awarding prejudgment interest.

---

[2] That is because, under the divided damages regime, once it became clear that both parties to a collision were at fault, each party knew the exact extent of its liability. (This assumes that the total damages were fixed by assessment or otherwise, as they often were, at least within a reasonably narrow range.) Now, the degree of each party's fault – often a highly controversial matter, as this case shows – must be litigated.

3. Respondents' account of the relevant precedents warrants correction in at least two respects.

a. Respondents state that "[t]his Court has long approved of prejudgment interest in mutual fault cases" (citing *The Manitoba*, 128 U.S. 97 (1887)) and that the "lower courts have carved out an exception" that allows trial judges discretion to withhold prejudgment interest. Resp. Br. 4. The fact that the Court did not take issue with the lower courts' decision to award prejudgment interest in *The Manitoba* (a case that, in any event, is not about prejudgment interest) of course says nothing about when district courts may exercise their discretion to deny prejudgment interest. And contrary to respondents' contention, the discretion to deny prejudgment interest in admiralty is not the creation of "lower courts": it was stated in broad and emphatic terms by this Court, in opinions by Justices Field and Bradley. *The Maggie J. Smith*, 123 U.S. 349, 356 (1887); *The Scotland*, 118 U.S. 507, 518-19 (1886). See Pet. Br. 8-9.

b. Like the court of appeals, respondents insist (Br. 5) that the Ninth Circuit's opinion in *Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 789 (1980), supports the court of appeals' decision in this case. This is a misreading of *Alkmeon Naviera*. See Pet. Br. 18 n.7. The Ninth Circuit in *Alkmeon Naviera* carefully and explicitly left the door open for a district court to do exactly what the district court did in this case: to make "a specific finding" (633 F.2d at 798) denying prejudgment interest in a case of mutual fault in which there is a good faith dispute over whether the defendant will be liable at all.

In *Alkmeon Naviera*, unlike this case, both parties admitted a significant degree of fault – a fact that the Ninth Circuit emphasized (see 633 F.2d at 798) – and there was, as a result, virtually no possibility that the defendant would escape liability. See id. at 792, 796. By contrast, in this case the City had every reason to believe that it would escape significant liability throughout the first decade of the litigation. Moreover, in *Alkmeon Naviera*, the defendant was more responsible than the plaintiff (id. at 792, 796); here, the City was at first virtually exonerated, and ultimately assigned only one-third of the fault. *Alkmeon Naviera*, therefore, was not a case in which a less guilty defendant was required to pay prejudgment interest to a more guilty plaintiff.

Finally, the district court in *Alkmeon Naviera* had given no explanation for its action (633 F.2d at 797), and the Ninth Circuit accordingly remanded to give it an opportunity to make a specific determination, if appropriate (id. at 798). By contrast, the district court here explicitly relied on the rule that prejudgment interest may be denied when there is mutual fault and a good faith dispute over liability. Pet App. 21a. At most, therefore, *Alkmeon Naviera* must be read to leave open the question at issue here.

4. Respondents propose (Br. 27) a rule under which prejudgment interest could be denied only on the basis of the plaintiff's "post-accident" conduct, such as the conduct of the litigation. This Court's decisions on prejudgment interest in admiralty do not hint at any such limitation; and in other areas the Court has, on several occasions, referred to broad equitable considerations of a kind that would justify denying prejudgment interest

solely on the ground that the plaintiff was more responsible for the loss than the defendant was. See, *e.g.*, *Blau v. Lehman*, 368 U.S. 403, 414 (1962) ("inequitable"); *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 352 (1939) (same); *Rodgers v. United States*, 332 U.S. 371, 373 (1947) ("relative equities" of the parties); *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989) ("fundamental considerations of fairness").

But even under respondents' proposed rule, the district court's exercise of discretion should be sustained. The significance of mutual fault is, in large measure, that it creates a possibility that the defendant will not be held liable. That in turn may warrant the district court in finding that the defendant's decision not to settle on the terms offered by the plaintiff was reasonable and should not be burdened by an award of prejudgment interest. Decisions about settlement are, obviously, "post-accident" events. Since a principal function of the finding of mutual fault is to shed light on the reasonableness of those decisions, the court of appeals erred even under respondents' proposal that the prejudgment interest inquiry be confined to "post-accident" events.

CONCLUSION

For these reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

GRANT F. LANGLEY*
City Attorney
RUDOLPH M. KONRAD
Deputy City Attorney
200 East Wells Street
Room 800
Milwaukee, WI 53202
Telephone: (414) 286-2601

Of Counsel:

DAVID A. STRAUSS
1111 East 60th Street
Chicago, IL 60637
MICHAEL F. STURLEY
727 East 26th Street
Austin, TX 78705

*Counsel of Record